

October 23, 2020

# IDAHO STATE BAR - CLE CHILD PROTECTION SECTION

- JUDGE JESSICA LORELLO

# Statistics

- ◎ 28 Unpublished COA Opinions
  - 27 Affirmed
  - 1 Vacated
- ◎ 3 Published COA Opinions
  - 2 Affirmed
  - 1 Vacated
- ◎ 5 Idaho Supreme Court Opinions
  - 3 Affirmed
  - 2 Vacated

# Idaho Supreme Court Opinions

- ⦿ Doe, 47466, January 31, 2020 – affirmed
  - Sufficiency of the evidence – neglect
    - Drug problem that interferes with parenting
    - Unstable employment or housing
    - Incarceration (sufficient)
    - Recent improvement not enough
  - Sufficiency of the evidence – best interests
    - Focus on child's need for stability & certainty
    - Ability to change/improve only one factor
    - “Too little, too late”
    - Child in foster care for his entire life

# Idaho Supreme Court Opinions

- ◎ Doe, 47415, February 4, 2020 – affirmed
  - Sufficiency of the evidence – best interests
    - Magistrate found Doe not credible
    - SOR – no reweighing
    - Broad discretion on best interests
      - Impact of foster care
      - Stability of home
      - Ability to improve situation
  - FN 2 – Findings of fact and conclusions of law prepared by the State disfavored

# Idaho Supreme Court Opinions

- ◎ Doe, 47230, April 16, 2020 – [vacated](#)
  - Attorney appointed to mother as guardian ad litem – removed due to conflict between roles, no substitute guardian appointed
  - Mother ultimately executed consent to terminate, but moved to set it aside – denied
  - Because of consent, mother did not participate in subsequent termination hearing
  - Issue: the proper form for consents to TPR
    - 16-2005(4) form is terminate in adoption case
    - 16-2007(3) form waives notice and appearance in termination case (but not a consent)
    - FORMS CANNOT BE COMBINED
    - “Outside the context of an adoption, a hearing on the merits of termination is *absolutely required*, even if a parent has” executed a 16-2007(3) waiver.
    - Error in denial of motion to set aside consent
    - Disposition “procedurally defective because of the ways in which Mother’s mental illness was handled.” No replacement GAL appointed. Error “under these circumstances” based on evidence that GAL needed.

# Idaho Supreme Court Opinions

- Doe, 47230, April 16, 2020 – [vacated](#)
  - FN 4: “While we recognize the press of cases in magistrate court, the practice of assigning the same child protection case to different magistrate judges is not appropriate. It should only be employed when no other option is available. If a different judge is assigned, a record of the reason necessitating the assignment should be made. Once a magistrate judge is assigned to a child protection case, it is always the best practice for that judge to retain responsibility for the case until its conclusion.”

# Idaho Supreme Court Opinions

- ⦿ Doe, 47534, April 16, 2020 – affirmed
  - Issues:
    - Abuse of discretion in allowing Department to amend petition to add separate, alternative basis for termination (failure to follow case plan)
      - IRCP 15 analysis – allows new claim/theory, no prejudice from amendment
    - Granting only a 2-week continuance to allow father to respond to alternative basis and failing to grant another continuance when father FTA
      - No sufficient objection to length of first continuance
      - Discretionary, based on circumstances
    - Sufficiency of evidence
      - Deference to magistrate on whether evidence is “stale”
      - “[T]he *bare minimum* for discharging parental responsibilities is presence in a child’s life.”
    - Note: a no contact order was entered prohibiting contact between father and social worker.

# Idaho Supreme Court Opinions

- ◎ Doe, 47789, July 9, 2020 – [GAL Appeal](#) - affirmed
  - Placement of children with father in Mexico without a home study
  - GAL opposed placement without more information about father and living situation
  - Motion to reconsider based on newly discovered evidence that father is a registered sex offender
  - Held: even assuming magistrate properly afforded biological parent's presumption of fitness to a non-citizen, the magistrate erred in applying it
    - Magistrate erred in relying on *Doe*, 153 Idaho 258, to conclude father entitled to custody – due diligence and consideration of health and safety still required
    - Sufficient evidence was presented to question presumption of fitness such that an evidentiary hearing should have been conducted
- Note: the Department did not file a brief in this appeal.



# COA Published Opinions

- ⦿ *Doe*, 47443, February 11, 2020 – affirmed
  - Issues:
    - Reasonable efforts are not reviewable on appeal from termination
    - Not impossible to complete case plan due to out-of-state placement in NY
    - Opportunity to master tasks in case plan did not negate best interests determination

# COA Published Opinions

- ◎ *Doe*, 47662, May 6, 2020 – affirmed
  - Evidentiary error – admission of IDHW’s narrative report under I.R.E. 803(6) business records exception
  - Conflict between I.C. § 16-2009 and IRE – IRE prevails
  - 68 page document with redacted entries
  - If not offered for the truth, it can’t be considered for the truth
  - Harmless error

# COA Published Opinions

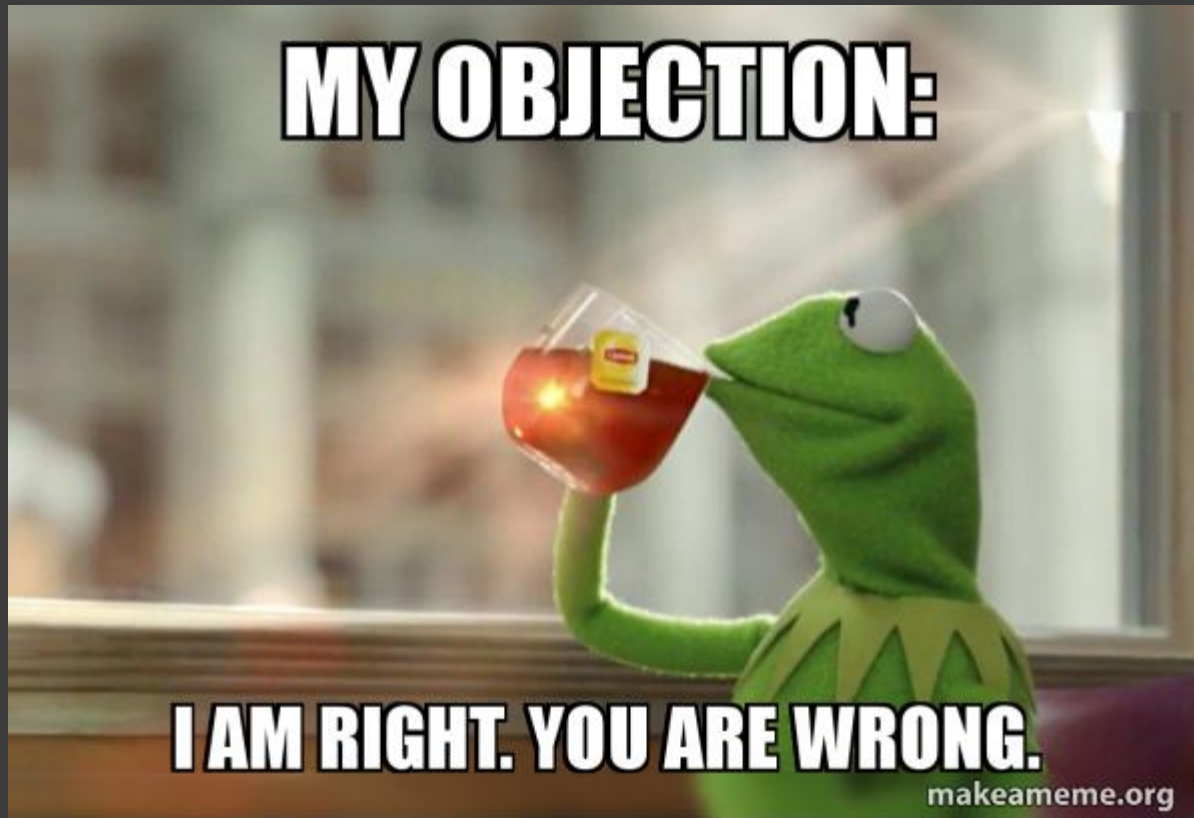
- ◎ *Doe v. Doe*, 47885, July 2, 2020 – [vacated](#)
  - No jurisdiction in Gem Co.
    - CP case in Ada following imminent danger
  - Error in entry of default judgment
    - Not addressed

# COA Unpublished Cases

- May not be cited as authority, but...



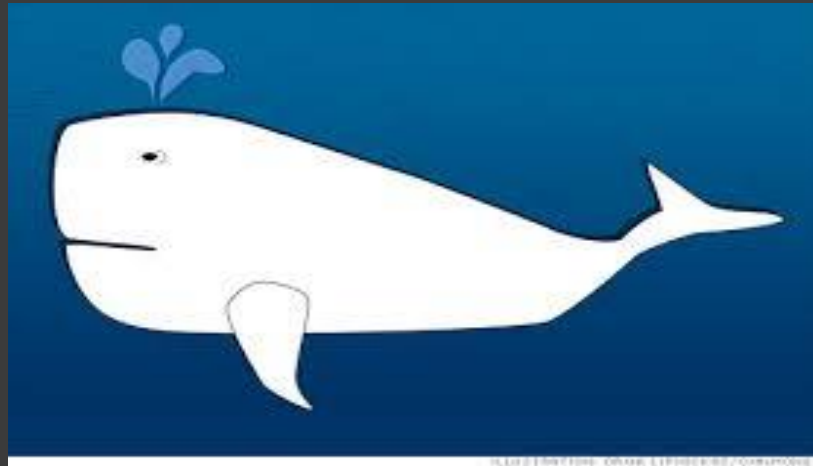
# Petition for Rehearing or Review – IAR 12.2(g)



# Recurring issues

- ⦿ Missing portions of the record
- ⦿ Preservation
  - Evidentiary objections
  - Legal issues raised to trial court
- ⦿ Argument & Authority
- ⦿ Reweighing
- ⦿ Unchallenged grounds for termination
- ⦿ No notice of intent not to file reply
- ⦿ No response to hearing notice

# The White Whale – Oral Argument



# Oral Argument

- Purpose: to emphasize and clarify written arguments and answer questions
- RESPOND to the notice asking if you wish to have oral argument and do so in a timely manner.